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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 558

WALTER O. LANFRANCONI, *Petitioner*

v.

TIDEWATER OIL COMPANY, *Petitionee*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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WALTER O. LANFRANCONI, *Petitioner*

v.

TIDEWATER OIL COMPANY, *Petitionee*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Walter O. Lanfranconi, petitioner herein, by his attorneys, prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review the decision of that Court in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, 376 F.2d 91 (2d Cir., 1967), entered on April 29, 1967, affirming the judgment of the United States District Court for the District of Vermont, upon conditions, is set forth in Appendix A. The order of the United States District Court for the District of Vermont (Gibson, J.), entered April 29, 1966, granting judgment on a jury verdict for the plaintiff, petitioner herein, is set forth in Appendix B. The order of the United States District Court for the District of Vermont (Gibson, J.), entered May 24, 1966, entitled, "Order Denying Defendant's Motions" is set forth in Appendix C.

## JURISDICTION

Plaintiff, petitioner herein, brought a civil action in United States District Court for the District of Vermont pursuant to the diversity jurisdiction provisions of 28 U.S.C. §1332. The jury found for the plaintiff in the amount of $20,000 compensatory damages and $35,000 punitive damages, and judgment was entered on the verdict.

Defendant appealed to the United States Court of Appeals for the Second Circuit, which Court affirmed the judgment of the District Court upon condition that the appellee, petitioner herein, remit all but $7,500 compensatory and $5,000 punitive damages. The order of the Court of Appeals was rendered on April 7, 1967 and entered in District Court on April 29, 1967.

On July 28, 1967 Mr. Justice White signed an order extending the time for filing a petition for writ of certiorari in this case to and including September 1, 1967, "without prejudice to the Court's consideration of whether this application has been filed in time."

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

## QUESTIONS PRESENTED

1. Whether a Court of Appeals may condition affirmance of the judgment of a District Court upon the plaintiff's remitting the major portion of exemplary damages awarded him by a jury, where no error of law affecting the award of exemplary damages appears in the record, where the evidence, under the applicable state law, is sufficient to support the verdict, and where the sole reason advanced by the Court of Appeals for imposing the remittitur condition is that "we are convinced that an award of exemplary damages of $35,000 was 'manifestly and grossly excessive' . . . "?

2. Whether the Court of Appeals correctly applied the law of the State of Vermont governing appellate review of asserted excessiveness of exemplary damages?

3. Whether a Court of Appeals has the power to review the asserted excessiveness of a District Court jury's award of damages, and if so, what standards must be applied by the Court of Appeals?

## STATUTE INVOLVED

Section 1291 of the Judicial Code, 28 U.S.C. §1291, found in Volume 7 of the United States Code at Pages 5959-60, provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

## STATEMENT OF THE CASE

Petitioner brought a civil action against petitionee Tidewater Oil Company in the United States District Court for the District of Vermont (Gibson, J., presiding), predicating jurisdiction on diversity of citizenship under 28 U.S.C. §1332. The complaint alleged wrongful interference with business relations and sought both compensatory and punitive damages.

The undisputed facts show that petitioner and one Domenichelli were partners in the operation of a retail gasoline station leased from the Tidewater Oil Company under a written lease; that the business was commenced in December, 1953 and was operated continuously by the two partners until June 30, 1961; and that on December 15, 1959, the partners had entered into a lease which under its terms would have expired in December, 1963.

Under the evidence, viewed most favorably to the petitioner as the party prevailing at trial, the jury could reasonably have found that the petitionee and the petitioner's partner conspired to eliminate petitioner from the partnership and to turn sole operation of the station over to the petitioner's partner; that the petitionee's agents fraudulently represented to the petitioner that his partner had effectively cancelled the partnership's lease and that they had deceived the petitioner into signing a cancellation form by representing to him that his signature was needed as a "mere formality" and that neither partner would thereafter operate the station; that on July 1, 1961, the day after the cancellation became effective, Tidewater turned sole operation of the station over to petitioner's former partner, who has continued to operate it ever since; that petitioner would not have

signed the cancellation but for the false representations of the petitionee's agents; and that as a consequence of the petitionee's wrongful behavior, the petitioner suffered actual damages in the amount of $7,500. Evidence of the defendant's wealth was submitted to the jury on the issue of exemplary damages, showing profits for a single year of $258,000,000.

The jury's verdict awarded actual damages of $20,000 and punitive damages of $35,000 to petitioner, and judgment was entered thereon in District Court. The Court of Appeals for the Second Circuit affirmed the judgment of the District Court on the condition that the petitioner execute two remittiturs. The first remittitur is for $12,500 of the actual damages awarded by the jury, and petitioner recognizes that the Court of Appeals was correct in this respect, because the evidence presented in the case cannot support a finding of actual damages in an amount greater than $7,500. The second remittitur is for all but $5,000 of the punitive damages, and it is the propriety of the Court's prescribing this remittitur as a condition of affirmance which petitioner seeks by this petition to have reviewed.

## REASONS WHY THE WRIT SHOULD BE GRANTED

### I.

### A CONFLICT AMONG CIRCUITS

This case presents a situation where the Court of Appeals for the Second Circuit has found — whether as a matter of law or of fact is not clear — that $35,000 punitive damages awarded by a District Court jury against the Tidewater Oil Company were "manifestly and grossly excessive," 376 F.2d 91, 96, and that $30,000 of that sum should be remitted as a condition of affirmance. The District Court judge, in the exercise of his discretion, had previously refused to order such a remittitur. (Appendix C.)

This action of the Court of Appeals for the Second Circuit thus directly conflicts with the position of the Court of Appeals for the Eighth Circuit, whose position was comprehensively restated in 1950

in the case of *St. Louis Southwestern Ry. Co.* v. *Ferguson*, 182 F.2d 949, and which reads in part:

> We have said many times that the excessiveness or inadequacy of a verdict is not a question for our consideration, but that the entreaty for any such vice lies solely to the judgment and the conscience of the trial judge on motion for a new trial. This is because the amount of a verdict is primarily a factual evaluation on inabsolute elements, while our function traditionally has been regarded as extending only to a testing of the soundness of the processes by which such a result has been achieved. 182 F.2d 949, 954.

The Eighth Circuit has consistently adhered to this position since 1950. Cf. *Zimmerman* v. *Mathews Trucking Corp.*, 203 F.2d 864, 868 (1953), *American Surety Co.* v. *Schottenbauer*, 257 F.2d 6, 13 (1958).

And in 1961, shortly after the Second Circuit in *Dagnello* v. *Long Island Rail Road Company*, 289 F.2d 797, retreated from its former position that the size of a verdict was not reviewable by a Court of Appeals, the Eighth Circuit had an opportunity to reexamine its own position and in *Solomon Dehydrating Co.* v. *Guyton*, 294 F.2d 439, refused to join the Second Circuit in retreat.

> We do emphasize again, however, that in our opinion, inadequacy or excessiveness of a verdict is basically, and should be, a matter for the trial court which has had the benefit of hearing the testimony and of observing the demeanor of the witnesses and which knows the community and its standards; that this is a responsibility which, for better working of the judicial process and for other seemingly obvious reasons, is best placed upon its shoulders; and that we shall continue to consider review, as we have said before, not routinely and in every case, but only in those rare situations where we are pressed to conclude that there is "plain injustice" or a "monstrous" or "shocking" result. Perhaps this is saying nothing more and nothing different than what the other courts of appeals have said in varying language. Perhaps in practice this court has observed a somewhat tighter standard than the others. *In any event, we still adhere to it.* 294 F.2d 439, 447-448 (Emphasis added.)

In addition to this rather absolute conflict regarding the powers of Courts of Appeals, it should be noted that most of the cases which

assert the reviewability of the size of a verdict in general terms are dealing, in fact, with compensatory damages and not punitive damages. Also involved in the present case is the fact that no error of law relating to exemplary damages was found by the Court of Appeals, which if any had been found, might have justified the Second Circuit's order for a remittitur. Thus the conflict between Circuits presented by this case is more acute than appears from the general language of the cases.

Because the Second Circuit has in this case exercised an asserted power to review the alleged excessiveness of punitive damages awarded in a District Court, and because the Eighth Circuit denies the existence of such a power of review, the petitioner respectfully submits that this Honorable Court ought to grant this Petition for a Writ of Certiorari, in order to reconcile this conflict between Circuits.

## II.

## MISINTERPRETATION OF VERMONT LAW

It appears that in the present case, the Court of Appeals for the Second Circuit has adopted as its rule of practice for cases arising in the District Court for the District of Vermont a rule which is a product of a misinterpretation of the rule set down by the Supreme Court of Vermont. In a diversity jurisdiction case such as this is, such a misinterpretation would in itself be a sufficient ground for reversal under the doctrine of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 (1938).

In this case, where the trial judge had refused to order a remittitur, the Second Circuit issued such an order upon a finding merely that "we are convinced that an award of exemplary damages of $35,000 was 'manifestly and grossly excessive' . . ." 376 F.2d 91, 96. The Vermont rule is that where the trial judge has refused to order a remittitur, an appellate court will interfere only upon finding an abuse of discretion on the part of the trial judge. It is only when the trial judge has, in fact, ordered a remittitur that an appellate court may order a further remittitur on the grounds that the

final award made by the trial court is still "manifestly and grossly excessive".

The leading case is *Woodhouse* v. *Woodhouse,* 99 Vt. 91, 130 A. 758 (1925) and was cited by the Court of Appeals in its opinion, 376 F.2d at 96. In the *Woodhouse* case, the Court stated the standard for a trial judge's interference with a jury's assessment of damages as follows:

> In those cases where there is no legal measure of damages, and they are unliquidated so the amount thereof is referred to the judgment and legal discretion of the jury, the court ordinarily will not interfere with their verdict, unless it clearly appears that the damages found are excessive or insufficient. Although the verdict may be considerably more or less than, in the judgment of the court, it ought to have been, still it will decline to interfere unless the amount is so great or small as to indicate that it is the result of perverted judgment, accident, or gross mistake. *Woodhouse,* supra at 157.

And with respect to a trial court's disposition of motions such as were made and denied in the case at bar (Appendix C), the Vermont Supreme Court narrowly restricted its own powers of review to the finding of abuse of discretion on the part of the trial judge.

> Should this Court, in the exercise of its revisory power, reverse the action of the trial court in disposing of the motion to set the verdict aside? Admittedly not, unless abuse of discretion is shown by the record. As to this, the recognized test is whether the discretion of the court has been exercised on grounds or for reasons clearly untenable, or to an extent clearly unreasonable. *Woodhouse,* supra at 160.

That the Second Circuit misapplied this rule of Vermont law is apparent from the fact that nowhere in the Court's opinion did it find that the District Judge had committed an abuse of discretion. Instead, the Second Circuit found that in its judgment, the verdict was "manifestly and grossly excessive", citing the case of *Gray* v. *Janicki,* 118 Vt. 49, 99 A.2d 707 (1953), a case which in turn cites the *Woodhouse* case. But both of those cases make clear that the "manifestly and grossly excessive" standard is applicable only after a trial court has already ordered a remittitur and not when a

trial court has refused so to order. *Woodhouse,* supra at 160, *Gray,* supra at 51-52.

It is important to bench and bar of the state of Vermont that lack of "uniformity in the administration of the law of the State", *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 75, be eliminated and that state courts and federal courts employ the same rule of practice in this regard; and for the standardization of practice in both systems, the petitioner respectfully submits that this Honorable Court ought to grant the Petition, in order to correct what appears to be a manifest misinterpretation of Vermont law.

## III.

## IMPORTANT QUESTIONS OF FEDERAL LAW

Petitioner believes that this Petition should also be granted for one of two alternative reasons. Either, as petitioner believes, this Court has already decided that a Court of Appeals has no power to review the asserted excessiveness of damages awarded by a District Court jury, and the Second Circuit has nevertheless undertaken just such a review; or, as the Second Circuit believes, this Court has not decided the questions presented by this case, and the petitioner believes that the question is one which frequently recurs and which is of great importance in the administration of justice in the federal court system and ought finally to be settled by this Court.

Petitioner believes that the question of the power of a Court of Appeals to review a "mere excess upon the evidence", *Southern Railway — Carolina Division* v. *Bennett,* 233 U. S. 80, 87 (1914, Holmes, J.), was decided by this Court in 1933 in the case of *Fairmount Glass Works* v. *Cub Fork Coal Co.,* 287 U. S. 474. In that case, Mr. Justice Brandeis said:

> The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for *error of fact* has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a circuit court of appeals. *Fairmount Glass,* supra at 481, emphasis added.

If indeed, that case settled the question presented by the case at bar, as the petitioner believes it did, then the action of the Court of Appeals for the Second Circuit in undertaking to review the asserted excessiveness of the verdict in the present case, where no error of law was made to appear, was clearly contrary to the decision of this Court, and for that reason, the Petition ought to be granted.

But in *Dagnello* v. *Long Island Rail Road Company*, 289 F.2d 797 (1961), the Court of Appeals for the Second Circuit denied at Page 800 that the *Fairmount Glass* case had settled the present question. Assuming that the Second Circuit is correct in its reading of *Fairmount Glass*, it is the petitioner's position that the question ought to be settled by this Honorable Court in the interests of efficiency of judicial administration and uniformity in the processes of justice. The question has arisen repeatedly (a partial list of the federal cases is contained in footnote 6 of the *Dagnello* opinion, supra), and the answers given by the various courts have not been uniform.

Among the questions which the petitioner would respectfully suggest that this Court might see fit to answer definitively by granting this Petition are the following:

(1) May a Court of Appeals order a remittitur where the compensatory damages awarded can be supported by the evidence but where the Court of Appeals finds the award to be excessive?

(2) May a Court of Appeals order a remittitur of punitive damages awarded by a jury, where evidence submitted to the jury would support the verdict, but where the Court of Appeals finds the jury's award to be excessive?

(3) May a Court of Appeals order a remittitur where no error of law appears in the record?

(4) In any case where it may be held that a Court of Appeals has power to order a remittitur, what is the standard of excessiveness by a jury or abuse of discretion by a judge which must be applied by the Court of Appeals?

(5) In any case in which a remittitur would be proper, should the damages be remitted to the lowest amount which a jury

might properly award, to the highest amount which can be supported by the evidence, or to an intermediate amount?

For the reason that the preceding questions are important to the administration of the federal court system and can be effectively settled only by a decision by this Honorable Court, the petitioner respectfully submits that his Petition ought to be granted.

## IV.

## USURPATION OF THE FUNCTION OF THE JURY

In the present case, the Court of Appeals for the Second Circuit found no error of law relating to the award of exemplary damages. Any error the Court found relating to the compensatory damages was adequately remedied by the Court's ordering a remittitur of all but $7500 compensatory damages, which were separately awarded by the jury and not combined with the exemplary damages.

In addition, there was the evidence of the petitionee's behavior toward the petitioner, and the jury was properly charged by the trial court that punitive damages "are given to stamp the condemnation of the Jury upon the acts of the Defendant on account of their malicious or oppressive character . . ." The jury was also properly charged under Vermont law that "where punitive damages are awarded, the wealth of the Defendant at the time of trial may be considered by you as an element in the determination of what would be a just punishment for it." And the evidence which the jury had in its hands showed the defendant had profits of $258,000,000 in one year.

Vermont law also clearly holds that "[Exemplary damages] cannot be measured by any precise rules, but are awarded in the discretion of the jury . . ." *Rogers* v. *Bigelow,* 90 Vt. 41, 49, 96 A. 417 (1916). In its opinion, the Court of Appeals paid lip service to this rule: "We are mindful of the rule that because punitive damages are incapable of precise determination, their assessment is 'largely discretionary with the jury,' *Gray* v. *Janicki,* 118 Vt. 49, 99 A.2d 707, 709 (1953)". But then the Court proceeded to make

an independent judgment as to what sum would be appropriate to award as punitive damages and determined that sum to be $5000 and ordered a remittitur accordingly. And this was done despite the fact that the Court of Appeals had found no reversible error in the record and despite the fact that the jury had before it sufficient evidence to support an award of $35,000 punitive damages.

In short, the Court of Appeals constituted itself a jury and assessed damages as it, in its sole discretion, deemed appropriate. The petitioner believes that such a usurpation of the function of the jury by the Court of Appeals ought not to be condoned by this Honorable Court, and that the action of the Court of Appeals so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. For this reason, the petitioner respectfully submits that the Petition ought to be granted.

## CONCLUSION

Because it appears that (1) the Courts of Appeals for the Second Circuit and the Eighth Circuit disagree concerning the power of a Court of Appeals to review the asserted excessiveness of a jury's award of exemplary damages; (2) the Court of Appeals for the Second Circuit has adopted as its rule of practice for cases arising in the District Court for the District of Vermont a rule which misapplies the rule of law set forth by the Vermont Supreme Court; (3) there is a serious question whether the questions presented by this case have been previously decided by this Court, and if they have, have been decided contrary to the practice adopted in this case by the Court of Appeals for the Second Circuit; and (4) the Court of Appeals for the Second Circuit in this case usurped the function of the District Court jury by determining for itself what an appropriate award of punitive damages would be, the petitioner respectfully urges this Honorable Court to grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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# APPENDIX A

## UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 195 — September Term, 1966.

(Argued November 22, 1966 Decided April 7, 1967.)

Docket No. 30779

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WALTER O. LANFRANCONI,

*Appellee,*

—v.—

TIDEWATER OIL COMPANY,

*Appellant.*

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Before:

WATERMAN, MOORE and HAYS,

*Circuit Judges.*

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Appeal from a judgment of $20,000 compensating damages and $35,000 punitive damages in favor of Lanfranconi for wrongful interference with business relations entered in the United States District Court for the District of Vermont after a trial before the Hon. Ernest W. Gibson and a jury.

Affirmed upon the condition that plaintiff remit all but $7,500 compensatory and $5,000 punitive damages.

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EDWIN W. FREE, JR., Barre, Vermont (Davis, Martin & Free, Barre, Vermont, on the brief), *for appellee.*

Moore, *Circuit Judge:*

Plaintiff, Walter O. Lanfranconi, a former major and minor league baseball pitcher, entered into a partnership with Dante J. Domenichelli in 1953 to operate a service station at a strategic intersection in Barre, Vermont. They leased the station from defendant, Tidewater Oil Company (Tidewater). Although slow at the beginning, business developed through the hard work and long hours put in by the partners and by 1957 was providing plaintiff with an annual income of over $7,000.00; as indicated by his federal income tax returns. In October 1959, plaintiff and Domenichelli entered into a new lease with Tidewater covering the period from December 15, 1959 to December 14, 1963. Under the terms of the lease, Tidewater could cancel at the end of six months or one year, but after that was committed to the full term unless the lessees failed to perform certain specified functions. The lessees, on the other hand, could terminate the lease jointly at any time upon thirty days' notice.

The first year of the new lease did not turn out to be as profitable for "Dan & Walt's," as the partnership was known, as in previous years with plaintiff's share of the profits for 1960 amounting to only a little over $4,500.00. Apparently, the two partners were experiencing a certain amount of hostility towards one another, with Domenichelli becoming increasingly upset over plaintiff's devotion to other interests (e.g., his family and occasional baseball scouting assignments) to the detriment of the service station business. Domenichelli's first outward ventilation of his concerns took place in January or February of 1961, when, after a sales meeting, he indicated to certain Tidewater representatives that he would like a station for himself. A Tidewater distributor salesman, present at the meeting, testified that Domenichelli was assured that if the partnership ever broke up he would get the station. By the beginning of June of that year, matters had not improved and Tidewater's Vermont manager suggested that Domenichelli alone should send in a letter "cancelling" the lease (the manager himself denied such action, but there was sufficient evidence below to support the conclusion that he did, in fact, solicit the letter). Domenichelli sent in a letter, pre-dating it to early May under the belief that this would

speed up the termination of the lease. Plaintiff was then informed of the fact that the lease was "cancelled" and was asked to sign a mutual cancellation form provided by Tidewater. Under representations by the Tidewater distributor salesman that the lease was already terminated and that Tidewater would take over the station with neither plaintiff nor Domenichelli being allowed to continue operating the station, plaintiff signed the cancellation form thereby effectively ending the lease and the partnership. In fact, of course, Domenichelli's letter had been totally ineffectual to end the lease because the joint action of the two partners was necessary to effect termination. The lease terminated on June 30, 1961 and on the next day, July 1st, Domenichelli was installed by Tidewater under a new lease to operate the station alone in total contravention of plaintiff's expectations. There was evidence that the distributor salesman, in an effort to assure Domenichelli's continued possession of the station, had actually prevented the partners from settling their differences by persuading Domenichelli not to offer to sell his share of the partnership to plaintiff.

Plaintiff instituted this action against Tidewater on the theory that the latter had wrongfully interfered with the partnership and had thus hastened both the partnership's demise and the lease's untimely cancellation, and had damaged plaintiff's well-established reputation in the community (that plaintiff was well known in the community is attested to by the fact that he had been presented with a car by the City of Barre in 1947 in recognition of his baseball exploits), all to the great financial detriment of plaintiff. Plaintiff asked for compensatory damages to cover his loss of income from July 1, 1961 until the end of the lease's natural term on December 14, 1963, his loss of partnership profits and his injured reputation in the community. Punitive damages were also requested.

After a trial during which the above facts were developed, the court instructed the jury that, if the jury found that Tidewater had wrongfully, intentionally interfered in the partnership's affairs, it could award plaintiff damages for loss of earnings, loss of his share of the partnership goodwill and damage to his reputation in the community. In addition, punitive damages could be awarded if the jury found defendant's conduct was motivated by "actual malice"

which included "conduct manifesting nothing worse than reckless and wanton disregard of plaintiff's rights." The trial court did not specifically instruct the jury on Vermont partnership law, as requested, and thus failed to inform the jury that a partner can voluntarily discontinue a partnership at any time.

The jury returned a verdict of $55,000—$20,000 in compensatory damages and $35,000 for exemplary damages. Tidewater's post-trial motions for judgment N. O. V., new trial or remittitur were denied and this appeal followed. We find the verdict to be grossly excessive, without basis on the record, with respect to both categories of damages. However, because we believe the jury could have reasonably found that plaintiff was injured by the wrongful conduct of defendant, we, in the interests of judicial expediency, will affirm upon the condition that plaintiff remit all but $7,500 compensatory and $5,000 punitive damages, leaving him a total of $12,500. Should plaintiff not accept this condition within thirty days from the filing of this opinion, the judgment of the district court is reversed and the cause remanded for a new trial.

*The Jury's Verdict*

Any doubt that this Court has the power to review a trial court's exercise of discretion in refusing to set aside a jury verdict as excessive was dispelled by *Dagnello* v. *Long Island RR.*, 289 F.2d 797, 798-806 (2d Cir. 1961), a case in which the excessiveness of the verdict was the only issue. However, where as here, the trial court in addition to allowing an excessive verdict to stand, in our opinion, improperly submitted a defamation issue to the jury upon which there was absence of proof, the jury award must be vacated.

The evidence adduced at trial is clearly insufficient to support an award of $20,000 in compensatory damages. There was evidence that plaintiff suffered some loss of earnings and that but for Tidewater's interference he might have realized more from the disposition of his share of the inventory and accounts receivable than he actually received in the eventual settlement worked out with Domenichelli. Each item of damages will be examined.

*Loss of earnings*: Plaintiff testified at trial that following his ouster on June 30, 1961, he was unemployed for some three months,

worked as a camp supervisor at $60 per week for three weeks, after a short layoff spent eleven months as a bowling instructor at an average of $65 per week, and finally took over a Mobil Oil Company service station which netted him an average of $90 per week over the remainder of the relevant period. A rough calculation based on these figures yields total earnings of about $9,000 during the period from July 1, 1961 to December 14, 1963, the termination date of the lease and the first date at which Tidewater could have legally forced plaintiff out of the Dan & Walt's station.

Plaintiff's earnings from his partnership with Domenichelli for the five and one-half years prior to the lease cancellation, as indicated by his federal tax returns, were as follows: 1956—$4,994; 1957—$8,046; 1958—$7,392; 1959—$7,067; 1960—$4,529; first 6 months of 1961—$3,154. Plaintiff's average annual earnings for that period work out to be slightly under $6,400. Projecting that average over the just under two and one-half years remaining under the lease, plaintiff might reasonably have expected earnings totalling $16,000, whereas in fact he earned about $9,000. By his own testimony, therefore, plaintiff's loss of earnings amounted to roughly $7,000.

*Loss of appropriate share of inventory*: Upon termination of the partnership on June 30, 1961, the inventory was evaluated at $6,228, the partnership debts were paid and the accounts receivable were transferred to Domenichelli. Plaintiff participated in these determinations through his counsel and an accountant and accepted a cash payment of $2,600 as full satisfaction of his share of the partnership. Plaintiff now contends in this suit against Tidewater that $2,600 was woefully inadequate as compensation for a half interest in the partnership as a going concern. At trial, when asked by his counsel to estimate the value of the inventory of materials and supplies at the time business ceased, plaintiff first answered, "I don't know, I can't say," but, when pressed, estimated a value "between $10,000 and $15,000." At the end of his direct testimony, plaintiff estimated that the fair market value of his half-interest in the service station on June 30, 1961 was $10,000, although he admitted he had offered to sell his share to Domenichelli for $7,500. On the other hand, Domenichelli testified that the value of each partner's share

in the business was $3,500 in June, 1961, this figure being based on the value of the partnership's equipment and cash. Domenichelli had offered that June to sell his share to plaintiff or to buy plaintiff's share for $3,500, but withdrew the offer upon the urgings of a Tidewater representative, who wanted Domenichelli to retain control of the station at all costs.

Plaintiff's estimate that his share of the business was worth $10,000 was based on the worth of the partnership as a going concern and was thus probably not limited to his share of the tangible assets, but included a share of the goodwill. But because plaintiff cannot recover compensation for loss of goodwill in this suit, as will be explained below, the inventory and other tangible assets must be evaluated alone. The best evidence of the value of the inventory is the bill of sale introduced below showing that plaintiff released his interest in the inventory for a payment of $6,228 by Domenichelli to the partnership account. After payment of partnership debts and a settlement of accounts receivable, plaintiff netted $2,600. Whereas there is little basis for finding that $2,600 was an unreasonable settlement, it is possible that but for Tidewater's interference, plaintiff might have settled for $3,500 with Domenichelli. In any event, it is unlikely that plaintiff suffered damages in excess of $900 with respect to compensation for his share of the tangible partnership property, if he suffered at all.

*Goodwill*: Although there was evidence that plaintiff and Domenichelli had built up a respectable goodwill in operating Dan & Walt's from 1953-1961, this goodwill at most had value to the partnership for the remaining term of the lease only. By its terms, the lease could not be assigned and consequently the partners could not have sold their business as a going concern without defendant's consent. Furthermore, at the end of the lease, if defendant refused to renew, the goodwill would evaporate as an asset of the partnership — the successor operator being under no obligation to compensate the former partners. In fact, the only sure benefit that accrued to the partnership from its development of goodwill was an assurance of a steady business and income for the remainder of the lease term. Thus to allow plaintiff to recover both for loss of earnings and for loss of goodwill would be to allow for double recovery for one factor,

namely, plaintiff's expectation of a steady income through December 14, 1963. The trial court erred in instructing the jury that it could award separate damages for loss of goodwill.

*Damage to reputation*: There was evidence that plaintiff had achieved a certain fame in Barre for his baseball exploits, but there was no proof that his reputation had suffered as a result of his business troubles with Tidewater. The trial court erred in submitting the question of defamation of plaintiff's character to the jury.

Reiterating, we feel that the jury's verdict of $20,000 compensatory damages is unwarranted on the basis of the record before us and cannot be allowed to stand.

*Punitive damages*: The trial court properly instructed the jury under Vermont law that punitive damages could be awarded if Tidewater's conduct manifested "a reckless and wanton disregard of plaintiff's rights." See *Rogers* v. *Bigelow*, 90 Vt. 41, 49, 96 Atl. 417 (1916). We are mindful of the rule that because punitive damages are incapable of precise determination, their assessment is "largely discretionary with the jury," *Gray* v. *Janicki*, 118 Vt. 49, 99 A.2d 707, 709 (1953), *Woodhouse* v. *Woodhouse*, 99 Vt. 91, 130 Atl. 758 (1925), *Rogers* v. *Bigelow, supra*, and a jury award should be interfered with only if "manifestly and grossly excessive." *Gray* v. *Janicki*, 99 A.2d at 709. In *Rogers, supra*, the court found the award for exemplary damages to be grossly excessive and remanded the cause for a reassessment of damages unless the plaintiff filed a remittitur of the full amount of exemplary damages.

Whether there was sufficient evidence below to submit the question of punitive damages to the jury is a very close question. That Tidewater had a legitimate interest in the continued smooth operation of its service station cannot be disputed. To preserve basic service stations standards, Tidewater's lease required the two partners to operate continuously 14 hours a day on weekdays and 13 hours on Sundays, to maintain adequate inventories and to keep the interior and exterior of the premises in a good and clean condition. The rent to be paid under the lease depended upon the number of gallons of gasoline pumped each month, although the lease is

somewhat ambiguous on this point. There was evidence that prior to 1961, Tidewater was pleased with the performance of Dan & Walt's and considered it to be one of Tidewater's best stations. Thus, when trouble developed between plaintiff and Domenichelli in 1961, it was only natural for Tidewater to seek a resolution of the difficulties in order to preserve the success of the particular station. Nor, when the partnership appeared to be beyond saving, was it unnatural for Tidewater to seek to have the more efficient (in its opinion) operator of the two, Domenichelli, continue to operate the station. But the means chosen by the Tidewater distributor salesman and its Vermont manager to foster the company's interests cannot be condoned. Thus, the deliberate scheming with one partner to trick the other partner into cancelling the lease constituted a tortious act without regard for plaintiff's rights, going beyond the legitimate protection of Tidewater's legal interests under the lease. From the facts developed at the trial, the jury could have found some malice in Tidewater's conduct, justifying an award of some punitive damages. However, we are convinced that an award of exemplary damages of $35,000 was "manifestly and grossly excessive," *Gray, supra,* and must be set aside.

*Power to order remittitur*: Professor Moore has noted that, while remittitur practice has been criticized for being inconsistent with the Seventh Amendment's guarantee of a jury trial in civil cases, "its use has become so universal in the trial and even the appellate courts and has had the apparent approval of so many Supreme Court cases, that it cannot be contended that its use is unconstitutional without a judicial uprooting of precedent akin to that effected by *Erie-Tompkins.*" 6 Moore's Federal Practice ¶59.05[3], at pp. 3738-40 (2d ed. 1965) (footnotes omitted). Professor Moore points out that appellate courts use remittitur in two general areas: (1) where reversible error is found in the proceedings below, but the court feels it can reasonably approximate the effect of the error on the size of the verdict below and, thus, conditions affirmance on the plaintiff remitting the portion of the verdict traceable to the error; and (2) where the excessiveness of the verdict alone is a ground for reversal, but the court grants the plaintiff the option of remitting the excessive portion or submitting to a new

trial. 6 Moore ¶59.05[3], at pp. 3749-51. The instant case covers both areas for, in addition to being intrinsically excessive, the jury verdict below was also partly based on the erroneous submission of the issue of defamation to the jury.

The obvious advantage of remittitur practice is that, given a jury verdict that cannot stand, the plaintiff may believe it to be in his interest upon the law and facts to accept a lower amount of damages. The need for a new trial with its consequent delay and expense is thus averted. Plaintiff's right to a jury trial is not compromised as he has the option of seeking a new trial; defendant cannot complain as, in awarding excessive damages, the jury at least indicated that defendant should pay the maximum allowable damages and, in fact, the final verdict after remittitur may be below the latter amount. See 6 Moore ¶59.05[3], p. 3745. Certain state appellate courts, notably New York, use remittitur practice widely with acknowledged success. See, e.g., *Toomey* v. *Farley,* 2 N. Y. 2d 71, 156 N. Y. S. 2d 840 (1906); *Falk* v. *Aware, Inc.,* 19 App. Div. 2d 464, 244 N. Y. S. 2d 259 (1st Dept. 1963), *aff'd,* 14 N. Y. 2d 899, 252 N. Y. S. 2d 95 (1964), *cert. denied,* 380 U. S. 916 (1965). In *Falk,* the Appellate Division, in reducing a punitive damage award of $1,250,000 against each of two defendants to $100,000 against the individual and $50,000 against the corporate defendant, commented: "It is the duty of the court to keep a verdict for punitive damages within reasonable bounds considering the purpose to be achieved as well as the mala fides of the defendant in the particular case." 244 N. Y. S. at 266 Cf. *Roginsky* v. *Richardson-Merrell, Inc.,* —— F. 2d ——, n. 12 (2d Cir. April 4, 1967).

The federal courts have been considerably slower in adopting widespread remittitur practice. Nevertheless, this Court has conditioned affirmance of a verdict on remittitur, see *Hill* v. *Long Island RR.,* 257 F. 2d 736 (2d Cir. 1958) (in FELA action, jury found plaintiff 30 percent negligent, but did not indicate whether its finding of $45,000 damages took the 30 percent into account; held, plaintiff has option of accepting $45,000 less 30 percent or going to a new trial); *Kendall* v. *United Air Lines,* 200 F. 2d 269 (2d Cir. 1952) (a diversity case, where it was not clear whether jury verdict included unauthorized 6 percent interest; reversed "unless the plain-

tiff agrees to a remittitur acceptable to the appellants."); cf. *Moore-McCormack Lines, Inc.* v. *Richardson*, 295 F. 2d 583 (2d Cir. 1961), *cross petitions for cert. denied*, 368 U. S. 989, 370 U. S. 937 (1962) (admiralty award reduced); *Alexancer v. Nash-Kelvinator Corp.*, 271 F. 2d 524 (2d Cir. 1959) (non-jury case). Other Circuits have sanctioned the use of remittitur under a variety of circumstances. See, e.g., *Flame Coal Co.* v. *United Mine Workers*, 303 F. 2d 39 (6th Cir., *cert. denied*, 371 U. S. 891 (1962)) (in case involving labor trouble, appellate court conditioned affirmance on remittitur of a substantial part of compensatory damages, while upholding the jury's award of punitive damages); *Baldwin* v. *Warwick*, 213 F. 2d 485 (9th Cir. 1954) (a diversity case remanded with directions for district court to order a new trial or "condition denial thereof upon remittitur of an important percentage of the amount awarded as punitive damages."); *Texas Co.* v. *Christian*, 177 F.2d 759 (5th Cir. 1949) (appellate court, applying Alabaman law of punitive damages, conditioned affirmance on remittitur of a portion of jury's general award representing both punitive and compensatory damages).

In requiring plaintiff to remit all but $12,500 of the total verdict, we have exercised our best judgment as to what amount should amply reimburse plaintiff for his actual losses as well as punish defendant for its wrongful conduct. $7,500 should cover plaintiff's actual losses, whereas the scanty evidence on the maliciousness of Tidewater's conduct justifies an award of no greater than $5,000 punitive damages. Should plaintiff be dissatified with this total verdict of $12,500, he is, of course, free to seek a new trial.

Affirmed upon stated conditions.

## APPENDIX B

## UNITED STATES DISTRICT COURT

For The

DISTRICT OF VERMONT

Civil Action File No. 4298

WALTER O. LANFRANCONI
vs.
TIDEWATER OIL COMPANY
} *Judgment*

This action came on for trial before the Court and a jury, Honorable Ernest W. Gibson, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that Judgment is hereby entered on the verdict of the Jury for the Plaintiff to recover from the Defendant Twenty Thousand Dollars ($20,000.00) Compensatory damages and Thirty Five Thousand Dollars ($35,000.00) Exemplary damages.

Dated at Burlington, in the District of Vermont, this 29th day of April, 1966.

EDWARD J. TRUDELL,
Clerk of Court

Endorsed:

Filed April 29, 1966
EDWARD J. TRUDELL, *Clerk*

## APPENDIX C

## UNITED STATES DISTRICT COURT

for the

DISTRICT OF VERMONT

WALTER O. LANFRANCONI
vs.
TIDEWATER OIL COMPANY
} Civil Action No. 4298

## ORDER DENYING DEFENDANT'S MOTIONS

The defendant, Tidewater Oil Company, has made motions in this case for judgment for the defendant notwithstanding the verdict of the jury and in the alternative, to set aside the verdict, and in the alternative, a remittitur be made, or alter or amend the judgment, and in the alternative order a new trial. After a hearing and consideration by this Court, it is the opinion of this Court that there are not sufficient grounds to grant any of the defendant's motions.

Therefore, *It is Ordered* that the defendant's motion for judgment for the defendant notwithstanding the verdict of the jury; motion to set aside the verdict, motion for remittitur, or alter or amend judgment; and its motion to order a new trial be and hereby are denied.

ERNEST W. GIBSON,
United States District Judge

Done at Brattleboro, in the District of Vermont, this 24th day of May, 1966.

Endorsed: Filed May 24, 1966
EDWARD J. TRUDELL, *Clerk*

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JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 558

WALTER O. LANFRANCONI, *Petitioner*

v.

TIDEWATER OIL COMPANY, *Petitionee*

## BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OCTOBER TERM, 1967

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No.....

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WALTER O. LANFRANCONI, *Petitioner*

v.

TIDEWATER OIL COMPANY, *Petitionee*

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## BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Tidewater Oil Company, petitionee in this matter, submits herein its brief in opposition to the granting of a Writ of Certiorari.

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## I

## COMMENTS UPON PETITIONER'S STATEMENT OF CASE

The statement of the case presented by the petitioner on Page 3 is substantially correct with the exception that petitioner's view of the evidence does not take into account that petitionee's agent in this matter admitted that he had lied during the course of negotiations and that his representations were outside the scope of his authority and that where petitioner mentions that the station was turned over on July 1, 1961 "the day after the cancellation became effective" petitioner does not take into account the evidence that the new lease was dated back to July 1, 1961 for the purpose of continuity and that the new owner, in fact, did not commence business until on or after August 15, 1961.

## II

## COMMENTS UPON PETITIONER'S QUESTIONS

The petitioner has presented three (3) questions on Page 2 of his petition—

QUESTION NUMBER I — contains an erroneous statement wherein he asserts that there was no error of law affecting the award of exemplary damages. You are referred to App. A, which is the report of the decision of the United States Court of Appeals for the Second Circuit, Page 7A, line 7, where the Second Circuit states as follows: "The trial court erred in submitting the question of defamation of plaintiff's character to the jury".

QUESTION NUMBER II — presented on Page 2 has been briefed on Page 6, 7, and 8 of the petitioner's petition and petitionee does not agree with the interpretation set forth by petitioner. The Second Circuit clearly stated that, in its opinion, the award for exemplary damages was "manifestly and grossly excessive".

## III

## VERMONT LAW CORRECTLY APPLIED

Petitioner quotes the leading case of *Woodhouse v Woodhouse* 99 Vt. 91, which quotation appears on Page 7 of his brief, and on Page 157 of the case. Even a cursory reading of this quotation makes it apparent that the Vermont Supreme Court will interfere with a verdict when it is found excessive and it will interfere when there is an indication that there has been a gross mistake. The Second Circuit has used language from another Vermont case, *Gray v Janicki* 118 Vt. 49, which, along with the Woodhouse case incorporates both the words "gross or grossly" and the word "excessive".

The petitioner quotes again on Page 7 from the Woodhouse case, Page 160 in an attempt to interpret the law of Vermont that an appellate court will not interfere with a verdict unless abuse of discretion is shown.

The petitionee contends that this statement of law only applies to the decision of a motion to set aside the verdict. The Second Circuit did not set aside a verdict—it only merely affirmed the verdict upon condition.

## IV

## NO CONFLICT AMONG CIRCUIT COURTS

AS ANOTHER REASON WHY PETITIONER'S WRIT SHOULD BE GRANTED — petitioner advances that there is a serious conflict among the various circuit courts concerning the order of a remittitur.

Petitioner briefs this proposition on Pages 4, 5, and 6 and relies entirely upon language of the Eighth Circuit. The Eighth Circuit has clearly set the record straight that there is no conflict among circuits as set forth in the quotations supplied by petitioner in the case *Solomon Dehydrating Co. v. Guyton* 294 F2d 439 at 447-448, with regard to the ordering of a remittitur. "Perhaps this is saying nothing more and nothing different than what the other courts of appeals have said in varying language. Perhaps in practice this court has observed a somewhat tighter standard than the others".

## V

## POWER TO ORDER REMITTITUR

Petitioner advances that there are important questions of federal law involved when a remittitur is ordered and that the ordering of a remittitur by itself becomes a usurpation of the function of the jury.

The Second Circuit was very careful in its decision to justify the power to order remittitur, Pages 8A, 9A, and 10A of the decision in the Appendix. The petitionee agrees with the analysis presented by the Second Circuit on Pages 8A, 9A, and 10A of petitioner's appendix.

## VI

## COMMENTS UPON PETITIONER'S REQUEST FOR ANSWER TO QUESTIONS

Petitioner asks this Honorable Court to answer (5) questions. In the event the court would seriously intend to make answer as requested, the petitionee takes this opportunity to correct some inaccuraciies set forth in the questions. .

QUESTION NUMBER I — the transcript and the decision of the Second Circuit make it clear and evident that the compensatory damages were not, cannot, and could not be supported by the evidence.

QUESTION NUMBER II — The Second Circuit has already found that the trial court was in error in submitting the issue of defamation which will certainly have bearing on the exemplary damages awarded.

QUESTION NUMBER III — The Second Circuit found that the trial court erred in instructing the jury that it could award separate damages for loss of good will and again erred in submitting the question of defamation of plaintiff's character to the jury, App. 7A of petition.

QUESTIONS IV and V — There is certainly less reason to impose standards upon a court of appeals than there is to impose standards upon a jury.

It should be made adequately clear to the petitioner that judgment was entered on the verdict of the jury and that this judgment was affirmed by the Second Circuit upon condition, which affirmance clearly set forth "should plaintiff not accept this condition within thirty (30) days from the filing of this opinion, the judgment of the District Court is reversed and the cause remanded for a new trial. App. 4A, and should plaintiff be dissatisfied with this total verdict of $12,500, he is, of course, free to seek a new trial".

## VII

## CONCLUSION

This Honorable Court has promulgated in Rule 19—reasons when it will review on Writ of Certiorari and will grant such a

review—"when there are special and important reasons". One of the reasons is when there is a conflict among Circuit Courts in decisions of important state questions or when a decision conflicts with applicable state law.

Both the petitioner's and the petitionee's brief clearly indicate that there is no such conflict in the decision of the Second Circuit Court. The only other reason would be that if the Second Circuit had so far departed from the accepted and unusual course of judicial proceedings or so far sanctioned such a departure as to call for this Court's power of supervision.

The petitioner contends that there is no such departure in this case since the ordering of a remittitur has been and is not unusual in Federal or State Courts in this country. Accordingly, the petition for a Writ of Certiorari should be denied.

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